January 17 1872
C J Hillyer
Atty Gen & Hall
argued

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 478.

HOSEA STOUT, PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

R Habeas Corpus

FILED DECEMBER 5, 1871.

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1 Ex. "A."

In the supreme court of the Territory of Utah.

To the Hon. Ja's B. McKean, chief justice of said court:

TERRITORY OF UTAH,
County of Salt Lake, sct:

Hosea Stout, being duly sworn, deposes and says: That he, the said Hosea Stout, is now a prisoner in the custody of the marshal of the United States for Utah Territory, and confined in the jail at Camp Douglas, Salt Lake City, Territory aforesaid;

That he, the said Hosea Stout, is not confined on a conviction of any felony or misdemeanor, or by virtue of any legal process, or in any other manner, or for any other cause, except as hereinafter set forth;

That the sole and only cause of the confinement of him, the said Hosea Stout, is as follows, to wit:

That said marshal of the United States for Utah holds him, the said
Hosea Stout, in custody, by virtue of a certain warrant, a certi-
2 fied copy of which is annexed hereto, and made a part hereof,
marked Exhibit "A;"

That said warrant was issued upon a certain pretended indictment, a certified copy of which is annexed hereto, and made a part hereof, marked Exhibit "B;"

That he, the said Hosea Stout, can only be indicted for the crime aforesaid by a grand jury, duly selected, drawn, summoned, and empanneled according to the laws of the Territory of Utah;

That said grand jury, by whom said pretended indictment was found, was not drawn according to said law, but an open venire was issued by order of the Hon. James B. McKean, judge of the third judicial district court of Utah Territory, a certified copy of which said order, with the endorsement of the clerk of said court thereon, is annexed hereto, and made a part hereof, marked Exhibit "C;"

That said William S. Walker, clerk of said court, issued a venire upon
said order, a certified copy of which venire is annexed hereto,
3 and made a part hereof, marked Exhibit "D;"

That said venire was delivered to one M. T. Patrick, marshal of the United States for Utah Territory, and that he, the said marshal of the United States for Utah Territory, selected and summoned certain persons by virtue of said writ of venire, a copy, duly certified, of the return of said marshal being annexed hereto, and made a part hereof, marked Ex. "E;"

That thereafter, and on the 18th day of September, 1871, in open
court, before said third district court of Utah Territory, the names of
the persons returned in said return of said marshal of the United States
for Utah Territory, as set forth in Exhibit "E," were called by the clerk
of said court, in open court, and the following persons answered, to wit:
Sharp S. Walker, Samuel Kahn, Alfred S. Gould, J. T. Miller, Chaun-
cey C. Nichols, J. Milton Orr, Elias L. T. Harrison, Geo. Q. Cannon,
James Townsend, Hiram B. Clawson, Christopher Diehl, James P. Page,
James Matthewson, Frank Hurlburt, Samuel Howe, Charles New-
4 boldt, Nelson Laurence, and Edward Ried, Elias B. Zabriskie;
and the following persons were excused, to wit: Sharp S. Walker,
Samuel Kahn, J. Milton Orr, Elias B. Zabriskie, Christopher Diehl,
Nelson Laurence, Edward Ried, Alfred Gould, George Q. Cannon, James
Townsend, and Hiram B. Clawson.

It was then ordered by the court that talesmen be summoned to fill out said jury; when the following persons were selected and summoned promiscuously, from the body of the county, by the marshal of the United States for Utah Territory, as talesmen, and answered in court, to wit: Charles Reid, Clayton L. Haynes, Hugh White, Edward Preble, James M. Day, William S. Woodhull, William M. Johns, Alphonzo F. Tilden, John W. Morehouse, Jacob Engler, J. B. Meader, Ezra C. Chase, John M. Wallace, James W. Hamilton, George W. Bostwick, Thomas Carter, and John Cunnington.

The following talesmen were then excused: George W. Bostwick, Thomas Carter, and John Cunnington.

The following persons were then empanneled, sworn, and charged as a grand jury, to wit: Samuel Howe, Chauncey Nichols, J. T. Miller, Elias L. T. Harrison, James P. Page, James Matthewson, Frank
5 Hurlburt, Charles Newboldt, Clayton L. Haynes, Hugh White, Edward Preble, James M. Day, William S. Woodhull, William M. Johns, Alphonzo F. Tilden, John W. Morehouse, Jacob Engler, J. P. Meader, Ezra C. Chase, John M. Wallace, Charles Reid, and James W. Hamilton; and constituted the grand jury by whom the pretended indictment was found and presented in this case.

That said jurors were selected by the marshal of the United States for Utah Territory aforesaid, instead of being selected in accordance with the territorial laws.

That they were summoned by the said marshal of the United States for Utah Territory, and not by either the territorial marshal or sheriff, as required by said territorial laws.

That said jurors and talesmen were selected, chosen, and designated, and called by said marshal of the United States for Utah Territory, promiscuously, and not by any drawing, or ballot, as prescribed by the laws of said territory, and in contravention of each and every section of the laws of said territory, prescribing the manner of drawing, selecting, and obtaining jurors to serve in the district courts of said Territory.

6 *Said jurors and talesmen were not selected, summoned, or called in accordance with the provisions of any act of Congress of the United States, nor in accordance with the practice or rules of any court of the United States, or in accordance with any rule of this court.

At the time of the empanneling of said grand jury this defendant was not under arrest, in custody, or on bail; nor was he charged with crime of any kind, prior to the finding of said indictment; nor did he have any opportunity at any earlier date than the present to interpose any challenge to said grand jury, or to either of said jurors.

Wherefore your petitioner prays that a writ of habeas corpus may issue as provided by law, and that he be discharged from his unlawful imprisonment.

HOSEA STOUT.

Sworn, subscribed, and *sworn* before me, this thirtieth day of October, A. D. 1871.

C. MYRON HAWLEY,
Clerk of the Supreme Court of Utah Territory.

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* "This statement is erroneous.
(Signed) "JA'S B. McKEAN
" *Chief Justice.*"

7 Ex. "A."—*Copy of bench warrant.*

THE TERRITORY OF UTAH,
Salt Lake County, ss:

The People of the United States in the Territory of Utah, to M. T. Patrick, United States marshal of Utah Territory, greeting:

Whereas the grand jury of the third judicial district of Utah has returned an indictment to the third district court of the Territory aforesaid, against Brigham Young, sr., Daniel H. Wells, Hosea Stout, William A. Hickman, and Joseph A. Young, charging them with, to wit, on the fifteenth day of November, A. D. 1857, feloniously, wilfully, deliberately, and with malice aforethought, killing and murdering one Richard Yates, contrary to the form of the statute of Utah in such case made and provided, and against the peace and dignity of the people of the United States in the Territory of Utah:

These are therefore to command you to take the said Brigham Young,
sr., Daniel H. Wells, Hosea Stout, William A. Hickman, and
8 Joseph A. Young, if they be found in said Territory, and them
safely keep, so that you have their bodies before the court aforesaid forthwith, to answer said indictment, and be dealt with according to law.

In testimony whereof I hereunto set my hand, and have caused the seal of my said court to be duly attached, this 28th day of October, in the year of our Lord, one thousand eight hundred and seventy-one.

[SEAL 3RD DIST. C'T, U. T.] JA'S B. McKEAN,
Chief Justice, &c., & Judge of the Third Judicial District Court of Utah Territory.

TERRITORY OF UTAH,
County of Salt Lake, ss:

[SEAL.] I, W'm S. Walker, clerk of the third judicial district of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original warrant of arrest in the above-entitled cause in my office.

Witness my hand and the seal of said court at Salt Lake City, this 30th day of October, A. D. 1871.

W'M S. WALKER, *Clerk.*

9 EXHIBIT "B."—*Indictment for murder in the first degree.*

TERRITORY OF UTAH:

In the third judicial district court in and for said Territory, regular September term thereof, A. D., 1871, Hon. Ja's B. McKean, judge.

THE PEOPLE OF THE UNITED STATES IN THE Territory of Utah
vs.
BRIGHAM YOUNG, SENIOR, DANIEL H. WELLS, Hosea Stout, William Hickman, and Joseph A. Young.

The grand jurors of The People of the United States in the Territory of Utah, good and lawful men, residents of the third judicial district of the Territory of Utah, lawfully summoned, called, empanneled, sworn, and charged, in and for the body of said judicial district, in the na
and by the authority of the people aforesaid, upon their oaths pres
that Brigham Young, senior, Daniel H. Wells, Hosea Stout, Will

Hickman, and Joseph A. Young, together, to wit, on the fifteenth day of November, in the year of our Lord one thousand eight hundred
10 and fifty-seven, with force and arms, at the mouth of Echo Cañon, in the county of Summit, in the third judicial district of the Territory of Utah, within the jurisdiction of this court, in and upon one Richard Yates, feloniously, wilfully, deliberately, premeditatedly, and with malice aforethought, did make an assault, and did, then and there, with an axe then and there held in the hand of William Hickman, beat, bruise, and wound the said Richard Yates, and with the said axe did then and there feloniously, wilfully, deliberately, premeditatedly, and with malice aforethought, strike, penetrate, and wound the said Richard Yates, in and upon the top of the head of him the said Richard Yates, thereby giving him the said Richard Yates one mortal wound, of which said mortal wound the said Richard Yates then and there instantly died. And so the jurors aforesaid, on their oath aforesaid, do say that the said Brigham Young, senior, Daniel H. Wells, Hosea Stout, William Hickman, and Joseph A. Young, in the manner and by the means aforesaid, feloniously, deliberately, wilfully, premeditatedly, and with malice aforethought, did kill and murder the said Richard Yates,
11 against the peace and dignity of the people aforesaid, and contrary to the form of the statute of the Territory of Utah in such case made and provided.

(Signed) SAMUEL HOWE,
Foreman.

(Signed) ROBERT N. BASKIN,
United States District Attorney.

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, W'm S. Walker, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment in the above-entitled cause, on file in my office.

Witness my hand and the seal of said court at Salt Lake City, this 28th day of October, A. D. 1871.

[SEAL.] (Signed) W'M S. WALKER, *Clerk.*

Said bill is endorsed as follows:

"The People of the United States in the Territory of Utah vs. Brigham Young, s'r, Daniel H. Wells, Hosea Stout, William Hickman, Joseph A. Young. Indictment for murder 1st degree.
12 "A true bill:
(Signed) "SAM'L HOWE, *Foreman.*

"Witnesses: William Hickman, John Flock.
"Returned and filed this 27th day of September, A. D., 1871.
"W'M S. WALKER, *Clerk.*"

13 Ex. "C."—*Copy of order to clerk.*

To W'm S. Walker, esq., clerk of the 3rd district court in and for the Territory of Utah.

SIR: It is hereby ordered that you issue to the United States marshal for said Territory a venire, commanding him to summon, from the body of the 3rd judicial district of said Territory, eighteen good and lawful men to act as petit jurors, and twenty-three good and lawful men to act as grand jurors, at a session or term of the said court to be held in the court-room in Salt Lake City, on Monday, the 18th day of September, instant, and that you make the same returnable then and there at 10 o'clock in the forenoon of that day; and hereof fail not.

Witness my hand at Salt Lake City, this 11th day of September, A. D. 1871.

JAMES B. McKEAN,
Judge of the Third District Court.

14 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, W'm S. Walker, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original order for venire for grand and petit jurors, for the September term, A. D. 1871, of said court, on file in my office.

Witness my hand and seal of said court, at Salt Lake City, this 30th day of October, A. D. 1871.

[SEAL.] W'M S. WALKER, *Clerk.*

15 Ex. "D."—*Copy of venire.*

District court, third judicial district Utah Territory. Regular September term, 1871. Hon. James B. McKean, judge.

TERRITORY OF UTAH,
County of Salt Lake, ss:

To M. T. Patrick, United States marshal for the Territory of Utah, greeting:

You are hereby commanded to summon twenty-three good and lawful men, residents of the third judicial district, to be and appear at the United States court, in Salt Lake City, on Monday, the 18th day of September, instant, at 10 o'clock, a. m., to serve as grand jurors for the third judicial district of the Territory of Utah. Hereof fail not and make due return of this venire, with the panel thereon endorsed.

Witness the Hon. James B. McKean, judge, and the seal of said court, at Salt Lake City, this 11th day of September, 1871.

[SEAL.] W'M S. WALKER, *Clerk.*

16 Ex. "E."

The said venire is endorsed by said marshal as follows, to wit:

"I hereby return the within venire, having summoned from the body of the third district of Utah the following-named persons to serve as grand jurors:

1. Sharp S. Walker.
2. Samuel Kahn.
3. J. Milton Orr.
4. Chauncey C. Nichols.
5. Charles L. Dahler.
6. Hiram B. Clawson.
7. Elias B. Zabriskie.
8. James Townsend.
9. Edwin Wooley.
10. Alfred S. Gould.
11. Frank D. Clift.
12. J. T. Miller.
13. G. L. T. Harrison.
14. Geo. Q. Cannon.
15. Christopher Deihl.
16. James P. Page.
17. James Matthews.
18. Frank Hurlburt.
19. Samuel Howe.
20. Charles Newbalt.
21. Nelson Lawrence.
22. Charles Trowbridge.
23. Edward Reid.

(Signed) "M. T. PATRICK,
"*U. S. Marshal.*

"SEPT. 18TH, 1871."

TERRITORY OF UTAH,
County of Salt Lake, ss:

I, W'm S. Walker, clerk of the third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original venire for grand jurors for the September term, A. D. 1871, (of said,) and of the U. S. marshal's return endorsed thereon, on file in my office.

Witness my hand and seal of said court at Salt Lake City, this 30th day of October, A. D. 1871.

[SEAL.] W'M S. WALKER, *Clerk.*

17 *Decision.*

"The territorial legislation touching grand juries in federal courts, being inapplicable thereto and inconsistent with federal legislation and practice, and the grand jury mentioned in the foregoing application for a writ of habeas corpus having been selected, summoned, and impanneled in accordance with the last-named legislation and practice, the said application is denied.

"Dated Nov. 2, 1871.

"JA'S B. McKEAN,
"*Chief Justice, &c.*

"Filed in the office of the clerk of the supreme court.
"C. MYRON HAWLEY, *Clerk.*"

18 UNITED STATES OF AMERICA,
Territory of Utah, sct:

I, C. Myron Hawley, clerk of the supreme court of said Territory of Utah, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Salt Lake, in the Territory of Utah, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-fifth.

[SEAL.] C. MYRON HAWLEY,
Clerk of the Supreme Court of Utah Territory.

19 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Hon. James B. McKean, chief justice of the supreme court of Utah Territory, greeting:

Because, in the records and proceedings, and also in the rendition of the judgment of a petition for the issuance of a writ of habeas corpus, which are before you, as chief justice of the supreme court of Utah Territory, between The People of the United States in the Territory of Utah and Hosea Stout, a manifest error hath happened, to the great damage of the said Hosea Stout, as by his petition appears: We, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be thereon given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the Supreme Court of the
20 United States, together with this writ, so that you may have the same at Washington on the fourth day of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this sixth day of November, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] C. MYRON HAWLEY,
Clerk of the Supreme Court of Utah Territory.

TERRITORY OF UTAH,
Salt Lake County, *ss:*

I, C. Myron Hawley, clerk of the supreme court in and for said Territory, do hereby certify that a true copy of the above and foregoing was this day filed in my office. 21

Witness my hand and official seal, at Salt Lake City, Utah Territory, this 6th day of November, A. D. 1871.

[SEAL.] C. MYRON HAWLEY,
Clerk of the Supreme Court of the United States
in and for Utah Territory.

22 UNITED STATES OF AMERICA, *ss:*

To The People of the United States in the Territory of Utah, third judicial district of Utah Territory, (Robert N. Baskin, district attorney of the United States for Utah Territory,) greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein Hosea Stout is plaintiff and The People of the United States in the Territory of Utah are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-one.

JA'S B. McKEAN,
Chief Justice of the Supreme Court of Utah Territory.

23 I served the within by delivering to the said R. N. Baskin, in person, a true copy of the same this 6th day of November, A D. 1871, as appears by his endorsement thereon.

D. S. DANA.

Sworn to & subscribed before me, by the said D. S. Dana, this 6th day of Nov., 1871.

C. MYRON HAWLEY,
Clerk Sup. C't of U. T'y.

I hereby acknowledge service by copy of the within citation, made upon me this 6th day of November, 1871.

R. N. BASKIN,
U. S. Attorney for Utah.

24 Supreme Court of the United States.

Hosea Stout
against
The People of the United States in the Territory of Utah.

Know all men by these presents that we, Hosea Stout, principal, and Hiram B. Clawson and L. S. Hills, of Salt Lake City, Utah Territory, are held and firmly bound unto The People of the United States in the Territory of Utah, in the sum of one thousand dollars, to be paid to the said people, their officers, and agents; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this sixth day of November, A. D. 1871.

Whereas the above-named Hosea Stout hath prosecuted a writ of error to the Supreme Court of the United States to *remove* the judgment rendered in the above-entitled petition for the issuance of a writ of habeas corpus by the Hon. James B. McKean, chief justice of the supreme court of Utah Territory:

25 Now, therefore, the condition of this obligation is such, that if the above-named Hosea Stout shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HOSEA STOUT. [SEAL.]
HIRAM B. CLAWSON. [SEAL.]
L. S. HILLS. [SEAL.]

Sealed & delivered in presence of—
L. A. Mann.
D. S. Dana.

Territory of Utah,
County of Salt Lake, sct:

Hiram B. Clawson & L. S. Hills, sureties and subscribers to the foregoing undertaking, being duly sworn, say that they are freeholders within the Territory & county aforesaid and residents thereof; and each of said subscribers for himself, and not for the other, further says he is worth the sum of one thousand dollars & more, subject to levy & execution, over and above all his debts and liabilities, and exclusive of property by law exempt from execution.

H. B. CLAWSON.
L. S. HILLS.

Sworn to & subscribed before me by the said Hiram B. Clawson & L. S. Hills, and sureties approved this 6th day of November, A. D. 1871.

C. MYRON HAWLEY,
Clerk Supreme Court of Utah Territory.

(Indorsed:) Sup. Court U. S. 1871. Dec. T. No. 478. Stout vs. People of Utah. Copy of bond on appeal. Filed 14 December, 1871. Bond for costs.

26 Supreme Court of the United States. Of the December term in the year of our Lord one thousand eight hundred and seventy-one.

HOSEA STOUT
against
THE PEOPLE OF THE UNITED STATES IN THE
Territory of Utah.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Hosea Stout, by Tho's Fitch, of his attorneys, and says that, in the record and proceedings aforesaid there is manifest error in this, to wit, because the said, the Honorable James B. McKean, chief justice of the supreme court of Utah Territory, erred in denying the application of the said Hosea Stout, the petitioner herein, for the issuance of the writ of habeas corpus in said proceeding before him as chief justice of the supreme court of said Territory as aforesaid, (whereof a copy of said record, proceedings, and judgment, is hereto attached, marked Exhibit "A,")
27 and because of the denial of said writ, and because of the refusal to discharge the said Hosea Stout from his alleged illegal confinement, or admit him to bail.

Whereas the said chief justice as aforesaid should have granted said application, and have caused said writ of habeas corpus to have been issued, and, upon the hearing of said cause, should have discharged said petitioner, the plaintiff in error herein, or have admitted him to bail in accordance with the law of the land.

And the said Hosea Stout prays that the judgment and order aforesaid be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said order and judgment.

THOMAS FITCH,
Of the Attorneys for Pl'ff in Error.

(Indorsed:) Sup. Ct. U. S. 1871. Dec. T. No. 478. Stout vs. People, &c., Utah. Assignment of error. Filed 14 December, 1871.

(Indorsement on cover:) No. 478. Hosea Stout, plaintiff in error, vs. The People of the United States in the Territory of Utah. Utah Terr'y sup. court. Filed 5th December, 1871.

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Supreme Court of the United States.

HOSEA STOUT, Plaintiff in Error,

vs.

THE PEOPLE OF THE UNITED STATES
IN THE TERRITORY OF UTAH.

STATEMENT.

Hosea Stout, the plaintiff in error, was arrested in the Territory of Utah, by the marshal of said Territory, on the twenty-eighth day of October, 1871. The authority for the arrest was a warrant issued from the district court of the third judicial district, purporting to be based upon an indictment found by a grand jury of said Territory, at the September term of said court. The indictment charged the commission, in the year 1857, of the crime of murder, under the statute of the Territory. The grand jury, by whom it was found, was a body of men, twenty-two in number, selected by the marshal, in obedience to an open venire, issued to him by order of said court. There was in force at the time a law of said Territory, prescribing the mode of procuring panels of grand and petit jurors, of which a copy is hereto appended. In the procurement of the panel by which this indictment was found, the provisions of this law were intentionally disregarded, and the selection was made from the inhabitants of the Territory at the discretion of the officer. The accused, upon his arrest, being advised that the proceedings were illegal, and the indictment and warrant invalid, applied to the supreme court of said Territory for a writ of *habeas corpus*, and in

Supreme Court of the United States.

Hosea Stout, Plaintiff in Error,

vs.

The People of the United States
in the Territory of Utah.

STATEMENT.

Hosea Stout, the plaintiff in error, was arrested in the Territory of Utah, by the marshal of said Territory, on the twenty-eighth day of October, 1871. The authority for the arrest was a warrant issued from the district court of the third judicial district, purporting to be based upon an indictment found by a grand jury of said Territory, at the September term of said court. The indictment charged the commission, in the year 1857, of the crime of murder, under the statute of the Territory. The grand jury, by whom it was found, was a body of men, twenty-two in number, selected by the marshal, in obedience to an open venire, issued to him by order of said court. There was in force at the time a law of said Territory, prescribing the mode of procuring panels of grand and petit jurors, of which a copy is hereto appended. In the procurement of the panel by which this indictment was found, the provisions of this law were intentionally disregarded, and the selection was made from the inhabitants of the Territory at the discretion of the officer. The accused, upon his arrest, being advised that the proceedings were illegal, and the indictment and warrant invalid, applied to the supreme court of said Territory for a writ of *habeas corpus*, and in the application set forth the facts, substantially as above stated. The court refused the application, basing its refusal upon the ground that the grand jury had been properly constituted, and that the territorial law in relation to the formation of jury panels was not binding upon the district courts of the Territory. (See Record, page 6.)

For the purpose of obtaining a review of this decision, the case is brought to this court by writ of error, as specially permitted by the organic act of said Territory. (Organic Act, sec. 9.)

ARGUMENT.

The only question of practical importance presented by the record, and the only one which (unless required by some suggestions from the defendant in error) I propose to discuss, is this: Is the law of the territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, obligatory upon the district courts of the Territory? The territorial law, as will be seen from an examination of its provisions, is in harmony with the usual State and territorial statute regulations upon this subject. It provides for lists to be made out in the several counties, by boards of county officers, at stated periods, and that the names of persons to constitute jury panels shall, as required, be selected from these lists by lot. It is designed to secure impartiality, and exclude, as far as possible, the influence of individual prejudice; and it fairly accomplishes this object. It is open to no objection, except that of invalidity, by reason of want of authority in the legislative body to legislate upon the subject.

The organic act, which has properly been called the constitution of the Territory, provides for the formation of a territorial legislature, and defines its power as follows:

> "SEC. 6. *And be it further enacted,* That the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil, no tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." (Brightly's Digest, p. 890.)

It will not be denied that the mode of procuring panels of jurors is a "rightful subject of legislation." The law in question is, therefore, valid and binding upon the courts, unless it is inconsistent with the Constitution of the United States or with the provisions of the organic act. The Constitution is silent upon the subject. The only clause in the organic act where the term jury is used, or the subject referred to, is that which says that, "but in no case removed to the supreme court shall trial by jury be allowed in said court." The organic act seems, therefore, in plain terms, to authorize the legislation, and I should add nothing to the simple citation of its provisions, were it not that the judges of the territorial court have, with great unanimity, reached a contrary conclusion. In order that the argument in favor of this conclusion, so far at least as it has been up to this time developed, may be distinctly understood, I have appended in full the original opinion upon this subject by the chief justice of the Territory, which has since been followed in respect to grand juries, and applied also to all trial juries, in these courts.

I gather from a careful reading of this decision that the reasoning upon which it rests is substantially this: The district court of the Territory is a district court of the United States, and therefore the general law of Congress, prescribing how juries shall be obtained in the courts of the United States, is binding upon the territorial court, and should be followed in preference to the territorial statute.

There is no question of the complete supremacy of the laws of Congress in the premises. The organic act itself provides, that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory, so far as the same, or any provisions thereof, may be applicable. The error of the decision is in assuming that there is legislation by Congress upon the subject of the formation of juries in the territorial courts. The only existing law upon the subject, to which reference can possibly have been made, is the following:

> "Jurors, to serve in the courts of the United States in each State respectively, shall have the like qualifications and be entitled to like exemptions as jurors of the highest court of law of such State now have and are entitled to, and shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced and hereafter to be practiced therein, in so far as such mode may be practicable, by the courts of the United States, or the officers thereof; and for this purpose the said courts shall have power to make all necessary rules and regulations for conforming the designation and impanneling of juries in substance to the laws and usages now in force in such State; and further shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the Legislatures of the respective States for the State courts."

In the first place, it seems somewhat singular that this section, even if it were applicable, should be quoted as authority for what has been done by the Utah court. It was enacted for the express purpose of securing impartiality and preventing the exercise of arbitrary discretion by the marshal, and it is difficult to conceive how it can be tortured into an authority to arm that officer in all cases with an open venire. Not only have its provisions not been followed, but it has been, in letter and spirit, defied and disobeyed. Where, in the circuit court of the United States, a jury panel had been summoned in the same manner for which the Utah court finds authority in this section of the law, the circuit court quashed the proceedings and dismissed the panel, upon the ground that the mode pursued was in direct violation of the provisions of the same section. (United States *vs.* Woodruff, 4 McLean's C. C. R., 109.)

In the second place, it is evident at the first glance that this section does not apply to the territorial courts. The language is: "That jurors to serve in the courts of the United States *in each State respectively*," &c. And the entire machinery is such as can only be used by a court sitting within the limits of a State. The organic act says that only those laws of Congress which are *applicable* shall be in force in this Territory, and this is certainly not one of them.

But there is a broader objection than either of these to making this section subserve the proposed purpose, and that is, that the court of Utah is not in any such sense a court of the United States that a general law regulating either the jurisdiction or the procedure of those courts would affect the territorial tribunal, unless included therein by express terms.

The term "courts of the United States" is one frequently used in acts of Congress, and has a well-understood signification. It is used to designate those tribunals which belong to the judicial system established by the IIId article of the Constitution of the United States, and with whom is lodged the jurisdiction conferred by the 2d section of that article. They are the "supreme and inferior courts" who exercise "the judicial power of the United States." To this system the territorial courts do not belong. They derive their powers from a different source, and have neither the same structure nor the same jurisdiction. The 9th section of the organic act, establishing the courts of this Territory, contains the following provisions:

> "*And be it further enacted,* That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually, and they shall hold their offices *during the period of four years.* * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, *shall be as limited by law.* * * * Writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations *as may be prescribed by law.*" (Brightly's Digest, p. 892.)

The chief justice, who, as seen in the decisions quoted—not from any analysis of powers, but from a mere collocation and comparison of names—satisfies himself that his court is a district court of the United States, holds his office for a term which, by the Constitution, is not permitted to the judge of a court of the United States, and is engaged nine-tenths of his time in the trial of causes of which no United States court can, by the Constitution, have jurisdiction. The whole question, as to the status of a territorial court, has been thoroughly examined and fully decided in this court. In the case of the American Insurance Co. *vs.* Carter, (1 Pet., p. 546,) Chief Justice Mar-shall, delivering the opinion, in speaking of the territorial courts of Florida, says:

> "These courts, then, are not constitutional courts, in which the judicial powers conferred by the Constitution on the general Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the IIId article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."

In Benner *et al. vs.* Porter, (9 How., 235,) the subject was again fully considered and the former decision affirmed; and in deciding as to the status of the court, and the effect upon it of the organization of a State government for the Territory, the court says:

> "The distinction between the federal and State jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts—Congress, in the exercise of its powers, in the organization and government of the territories, combining the powers of both the federal and State governments. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of the government as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. * * * We think it clear, therefore, that, on the unconditional admission of Florida into the Union as a State, on the 3d of March, 1845, the territorial government was displaced, abrogated, every part of it, and that no power of jurisdiction existed within her limits, except that derived from the State authority, and that by force and operation of the federal Constitution and laws of Congress, and especially no jurisdiction in federal cases, until Congress interfered, and extended the judicial tribunals of the Union over it."

X Since these decisions I know of no re-examination of the subject in this court. They show that these territorial courts are, by their origin, their structure, and their jurisdiction, as widely separated from the constitutional judiciary system of the United States as are the State courts. They in certain cases exercise a portion of the same jurisdiction as do the circuit and district courts of the United States, and so also do the State courts. It is possible, if one so choose, to call them courts of the United States, because they derive their authority from Congress; but

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there is no reasonable excuse for seizing upon a forced analogy in names for the purpose of bringing these legislative tribunals within the provisions of laws of Congress, made for and by their terms only applicable to those United States courts proper established under the judiciary article of the Constitution.

The jury provision in question prescribes a mode impossible to be employed by a territorial tribunal; and the only event which could make its terms applicable, to wit, the admission of Utah as a State, would, as decided in Benner *v.* Porter, of itself, terminate the existence of the court. If this section could be held to embrace the territorial courts, then they would be embraced in each of the numerous enactments respecting the district courts of the United States; for there is no one of them from which the language and sense more imperatively requires that they should be excluded.

The key of the decision is found in the interrogatory: "Can it be that a court with such powers is left by Congress to the control of the Legislative Assembly of the Territory?" The question seems to betray a misapprehension, not only of the status of the court, but of the object for which it was established. The chief justice appears to regard it as an instrument for the enforcement upon the people of the Territory of the edicts of the federal Government, instead of part of a system, of which the main object is in accordance with the general popular spirit of our institutions, to permit the people of the Territory to govern themselves.

The general clause conferring jurisdiction upon the court is, that the jurisdiction shall be "as limited by law;" that is, by the law of that same territorial legislature from which the court seems to deem it so necessary to emancipate itself. It is true, there are certain provisos, and that the court is made the arbiter of "cases arising under the Constitution and laws of the United States." But this portion of jurisdiction is, in amount and importance, insignificant, compared with that which has its source in the territorial law. The real magnitude of the powers of the court lies in the fact, that it is intrusted with the decision of the ordinary questions affecting life, liberty, and property, to which the daily intercourse of a populous and industrious community gives rise. When the security of a people, in the titles to their farms and their mining claims, in their contracts and their personal liberty, is placed under the guardianship of a judicial tribunal, constituted as are these territorial courts, it is not strange, nor should it be the cause of any uneasiness, that it is permitted to the people themselves to determine, by the usual legislative provisions, the mode of selecting the panels of jurors, whose fairness and impartiality are to them a matter of such vital interest. Respectfully submitted,

C. J. HILLYER,
For Plaintiff in Error.

APPENDIX.

An Act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors for the district courts, and for other purposes.

Sec. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That members and officers of the Legislative Assembly, judges of probate courts, selectmen, county treasurers, clerks of the supreme, district, probate, and county courts, the territorial marshal, deputy marshals, sheriffs, deputy sheriffs, constables, attorneys and counsellors at law, persons at the time engaged in teaching school, ferrymen, millers, physicians, surgeons, and editors of newspapers and other periodical publications, are exempt from serving either as grand or petit jurors.

Sec. 2. The county court in each county shall, at its first session in each year, and at such subsequent session, or other time as a neglect so to do at said first session, or as other circumstances may require, make, from the assessment roll of the county, a list containing the names of at least fifty men, residents of the county, eligible to serve as jurors.

Sec. 3. Said list shall contain only the names of such persons as are known or believed to possess the requisite qualifications for jurors, and not entitled to exemption from jury service; and the names thereon shall be apportioned among the different sections of the county, as nearly as may be, according to the names on the assessment roll; and the selections of persons to serve as jurors shall from time to time be made in such manner, so far as the county court can judge, as to cause the eligible persons to perform jury duty as nearly as may be in rotation.

Sec. 4, Said list shall contain the christian and surname at length, and the place of residence and occupation, of each person named therein, and shall be filed with the clerk of the county court, who shall keep in his office a box or other safe place of deposit in which he shall deposit the names on the list, having previously written each name on a separate ticket, and so folded said ticket that the name thereon does not appear.

Sec. 5. When a district court is to be held, whether for a district or for a county, the clerk of said court shall, at least thirty days previous to the time of holding said court, issue a writ to a marshal or any of his deputies, if said court is to be holden for a district, or to the sheriff or any of his deputies of the county in which said court is to be held if it is to be held for a county, specifying the time and place of holding said court, and requiring him to summon, if for a grand jury, twenty-four eligible men to serve as grand jurors; and, if for petit jurors, twenty-four eligible men to serve as petit jurors; and said twenty-four men shall constitute a grand jury; and said twenty-four men shall constitute two full petit juries.

Sec. 6. Upon the reception of said writ, a marshal or sheriff, as the case may be, or either of their deputies, shall proceed to the clerk of the county court of the county in which jurors are to be summoned, and said clerk shall forthwith repair, with said officer having said writ, to the office of said clerk, who shall, if a grand jury is required, in the presence of said officer, thoroughly shake the tickets previously deposited in a box or other safe place of deposit, and draw therefrom promiscuously twenty-four tickets, and the persons whose names are on those twenty-four tickets shall be summoned to serve as a grand jury, a minute of which drawing shall be kept by said clerk, with the names entered thereon in the order they are drawn; when, if petit jurors are also required, said clerk shall proceed in like manner to draw and minute twenty-four tickets, and the twenty-four persons named on said tickets shall be summoned to serve as petit jurors; said clerk and attending officer shall then sign the minutes of the drawing, which minutes shall be filed by said clerk in the office of the county court of the country in which said drawing was had.

Sec. 7. Upon the conclusion of the drawing, and previous to the filing as aforesaid, said clerk shall forthwith make a list of the names of the persons drawn, if any, to serve as petit jurors, and certify to said list, or lists, and deliver it, or them, to the officer having the writ from the clerk of a district court to summon jurors.

Sec. 8. The officer having the writ and jury list, or lists, in charge, as hereinbefore provided, shall, immediately upon his reception of said list, or lists, proceed to summon the persons named on said list, or lists, to attend said court, specifying the time and place of its sitting; which summons shall be served by giving each person a written notice, or by leaving a copy of the summons at his residence in care of some person of suitable age and discretion.

Sec. 9. If, in summoning the persons named on said list or lists, said officer becomes aware that, from any cause beyond his control, there will be a failure by one or more of said persons to appear as required, he shall forthwith repair to the aforesaid clerk of the county court, who shall, with said officer, proceed to draw, as hereinbefore provided, until the required number of jurors can be procured; and said officer shall return said list, or lists, and writ to said district court at the time specified, and shall specify the persons summoned, and the manner in which each was summoned.

Sec. 10. When a district court is to be held for a district, and the judge thereof is reliably advised that the ends of justice will be materially promoted by so doing, said judge may apportion the twenty-four grand jurors among two or more counties in his district.

Sec. 11. After a grand jury is empanneled, sworn, or affirmed, and charged by the court, said court shall appoint one of their number to be their foreman; and said foreman shall have power to swear or affirm all witnesses to testify before said grand jury; and shall, when the grand jury or any twelve of them have, upon to them good and sufficient evidence, found a bill of indictment, indorse thereon the words, to wit: "A true bill," and officially sign his name to said indorsement, and also note or cause to be noted on the bill of indictment the name or names of the witnesses upon whose evidence it was found.

Sec. 12. The clerk of the district court shall write upon separate tickets the names of the persons returned to serve as petit jurors, shall so fold said tickets that their names thereon do not appear; shall deposit them in a box or other safe place of deposit; and, when ordered by the court, draw from said box or place twelve names; and the persons whose names are drawn shall constitute a petit jury, except such as are legally rejected; and, in case of such rejection, said clerk shall continue to draw until said petit jury is complete; and, if the number of the petit jurors returned to said court shall be exhausted, then the proper officer shall, upon the order of the judge, summon talesmen from the body of the county to complete said panel.

Sec. 13. If, during any term of said district court, the number of jurors provided proves insufficient, the clerk of said court shall immediately issue a writ, directed to one of the officers before named as the persons to serve such writs, for the requisite number; and said officer shall at once proceed to procure them in the manner hereinbefore provided; and, in case said writ exhausts the names already selected, the clerk of the county court of the proper county shall forthwith call a meeting of said court, which shall immediately select, in the manner already specified, at least as many names as may at that time be deemed sufficient.

Sec. 14. A district court is hereby empowered to sit at the county seat of any county within its district, to try cases arising in such county, whenever the county court of said county shall make provision to defray the expenses of said district court.

SEC. 15. If any person fails to appear as a grand or petit juror when lawfully summoned, or if a marshal, or his deputy, or any clerk of the district or county court, or any sheriff, or his deputy, fails to fulfill the duties enjoined upon him in this act, without having a reasonable excuse, he shall be considered guilty of contempt, and may be fined for each offense, for the use of the county in which the defendant resides, in any sum not exceeding fifty dollars, unless, at or before the next term of said district court, good cause be shown for such failure: *Provided*, That the oath or affirmation of any such delinquent shall at all times be received as competent evidence in his favor.

SEC. 16. It shall be the duty of the clerk of a district court, at the close of each term of said court, to made out and give to each juror a certificate certifying the number of days' attendance of and amount of compensation due to said juror, which certificate, upon being presented to the county court of the county from which said juror was summoned, shall entitle said juror to be allowed and paid by said county the sum specified in said certificate, as other demands against the county are paid: *Provided*, That no juror shall be paid out of the county treasury for any jury service for which he may have received or be entitled to receive pay for sitting as a juror upon United States business.

Approved January 21, 1859.

AN ACT to amend "an act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors, and juries for district courts, and for other purposes," approved January 21, 1859.

SEC. 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah*, That sections five, six, and ten of the act defining who are exempt from serving on juries, and prescribing the mode of procuring grand and petit jurors, and juries for district courts, and for other purposes, approved January 21, 1859, be, and the same hereby are, repealed, and in lieu thereof the following be enacted: When a district court is to be held for a district, and the judge thereof is reliably advised that the ends of justice will be materially promoted by so doing, he may apportion the jurors, both grand and petit, between two or more counties of his district.

SEC. 2. When a district court is to be held, whether for a district or for a county, the clerk of said court shall, at least thirty days previous to the time of holding said court, issue a writ to the territorial marshal, if said court is to be holden for a district, or to the sheriff of the county in which said court is to be held, if said court is to be held for a county, specifying the time and place of holding said court, requiring him to summon eighteen eligible men to serve as grand jurors, and eighteen eligible men to serve as petit jurors.

SEC. 3. Upon the reception of said writ, the territorial marshal or sheriff, as the case may be, shall proceed to the office of the clerk of the county court of the county from which jurors are to be summoned, and the said clerk shall, in the presence of the officer, thoroughly shake the tickets previously deposited in a box or other safe place of deposit, and draw thereform promiscuously the number of jurors required to be summoned from such county for grand jurors and for petit jurors, keeping separate lists; and those drawn for grand jurors shall be summoned for grand jurors, and those drawn for petit jurors shall be summoned for petit jurors, which lists shall be signed by the clerk and officer having said writs, and filed in the office of said clerk.

SEC. 4. The court shall impannel out of the list summoned as grand jurors fifteen eligible men to serve as a grand jury: *Provided*, If, from any cause, there shall not be in attendance upon the court of those summoned for a grand jury enough to make the number of fifteen, the court may order the pannel to be made up of those summoned for petit jurors, or from eligible talesmen summoned from the body of the county or district, as the case may be, and not from the bystanders.

Approved February 18, 1870.

Opinion of Chief Justice James B. McKean.

McKean, C. J. The Legislative Assembly of this Territory possesses large powers. The act of Congress organizing the Territory, approved September 9, 1850, provides "that the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." But the Legislative Assembly derives none of its powers from the Republic of Mexico, to which the Territory once belonged. That Assembly is the creature of the Congress of the United States, and has no powers save such as are delegated to it, expressly or impliedly, by the act organizing the Territory. And Congress, in that act, reserved to itself the right to disapprove any and all acts of the Assembly, even when such acts are within the scope of the powers delegated to the Assembly. If any acts of the Assembly are beyond the scope of the powers delegated to it, they may be set aside by the courts as well as by Congress. There is but one sovereignty in Utah, and that is the sovereignty of the United States.

Having considered the powers and limitations of the Legislative Assembly, let us next inquire what are the powers and limitations of this court. What kind of a court is it? It is certain that it was neither created, nor can be abolished, by the Legislative Assembly of Utah. Its judge was not appointed nor elected, nor can he be removed nor impeached, by the Assembly. This court is not technically a territorial court. No one claims that it is a State court. Its jurisdiction is without the bounds of the States, and it derives none of its authority from any of the States. Under the United States Government there are several tribunals. There is such a tribunal as the Supreme Court of the United States, whose terms are held in the Capitol at Washington. There is such a tribunal as the district court of the United States for the northern district of the State of New York. The act of Congress organizing this Territory (sec. 10) refers to such a tribunal as the "district court of the United States for the present Territory of Oregon." There is such a tribunal as the district court of the United States for the third district of the Territory of Utah; and this last-named court is here and now in session. When, in October next, the judge of this court shall sit here, with his brothers Strickland and Hawley associated with him, that tribunal will be the supreme court of the United States for the Territory of Utah. The supreme and districts courts of this Territory are, therefore, courts of the United States.

The act of Congress organizing this Territory provides, that "the said supreme and districts courts, respectively, shall possess chancery as well as common-law jurisdiction." It further provides, that "each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States." It further provides, "that the six first days of every term of said courts, or so much thereof as shall be necessary, shall be appropriated to the trial of causes arising under the said Constitution and laws." That is to say, this district court has greater powers than those vested in the United States circuit and district courts within the States; for, after devoting, if necessary, the first six days of this term to the trial of causes arising under the Constitution and laws of the United States, then this court must proceed to hear any such causes as, in the States, are tried in the State courts which possess chancery as well as common-law jurisdiction. This last-named jurisdiction is given to this court for the reason that Utah is not a State, but is a Territory. Can it be that a court with such powers is left by Congress to the control of the Legislative Assembly of the Territory?

Is there any law prescribing the manner of procuring grand and petit jurors for criminal cases in this court? If there is, what is it? Is it an act of the Congress of the United States, or an act of the Legislative Assembly of the Territory? If both, are they consistent with each other? And if inconsistent, which must prevail?

While acting by assignment in this district, Mr. Justice Strickland, "upon notification by the United States attorney, that a grand jury would be needed," and also in the exercise of "his own discretion," ordered a *venire* to be issued by the clerk of this court to the United States marshal for the Territory. He did so in pursuance of those well-known acts of Congress which prescribe this method of procuring juries in the circuit and district courts of the United States. The service of that *venire* by the marshal has brought these jurors into court. The act organizing the Territory (sec. 10) requires the marshal to perform the same duties as the marshal of the district court of the United States for the then Territory of Oregon; and those duties were the same as those of the marshal in the northern district of New York. One of those duties is the summoning of juries.

In the case of Branningan *v.* The People, decided by the supreme court of this Territory, and cited on the argument here, the petit jury was not summoned in accordance with either the laws of Congress or those of the Assembly. The conviction of the prisoner was, therefore, properly set aside.

Having considered the powers and limitations of the Legislative Assembly, and also of this court, let us now inquire what the Legislative Assembly has done or undertaken to do in the premises.

As already stated, the act to organize the Territory was approved September 9, 1850, and until January, 1853, more than two years thereafter, the Assembly seems not to have touched the question of grand and petit jurors for criminal cases in this court. Was there then no law upon this subject during those two years? Judge Snow, the senior member of this bar, to whose learned and exhaustive argument in support of this challenge I listened with great interest and pleasure, was the first judge who sat on the bench where I now have the honor to sit; and that learned judge, in pursuance of the acts of Congress, ordered the *venires* to be issued to the United States marshal for the Territory of Utah, and that marshal summoned the jurors. I am not now saying whether that was right or wrong; but this I will say, that if it was wrong, then every man indicted and every man convicted during those years was unlawfully indicted and unlawfully convicted.

But what did the Legislative Assembly do in January, 1853? It enacted thus: "In jury cases, before the introduction of any evidence, the court shall issue an order, requiring an officer to summon, for that purpose, a reasonable number of judicious men," &c.; and further, thus: "When necessary, the court shall issue an order, requiring an officer to summon fifteen judicious men, residents of the county, for a grand jury," &c. Whether this act was intended to apply to this court or not, it makes no attempt to take from the court the control of the *venire*. The words, an officer, may mean, and should be construed to mean, the "proper officer of the court"—in this instance the United States marshal; and that officer is left at liberty to summon whom he pleases, provided they be "judicious men." There is in these particulars no necessary conflict between Congress and the Assembly.

The act of Congress to organize the Territory (sec. 9) provides "that the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace." The Assembly can no more add to this number of judicial bodies than it can abolish one or all of these. But by act, approved Jan. 8, 1866, the Assembly has enacted that the probate judge in connection with three select men shall be known as the "county court." Among the many duties devolved upon this "county court" are the "care, custody, and management of insane persons, who are incapable of conducting their own affairs and of their estate, both real and personal;" and "the selectmen may transact business separately, subject to the approval of the "county courts," relating to the poor, insane persons, orphans, and minors," &c. "They shall also have power to appoint guardians for minors who are orphans, for the persons and property of the insane," &c. By another act, the Assembly directs these "county courts" to select the men from among whom it commands the jurors to be taken for this district court. It is not necessary, however, in disposing of the question at bar, to pass upon the legality of these "county courts."

But the Legislative Assembly, by act of January, 1859, amended in February, 1870, has sought to take from the district judge, the United States attorney, and the United States marshal, all control over the jurors of this court. Congress says that the judge, in his own discretion, or upon a notification by the attorney that a jury will be needed, shall order the *venire* to issue; the Assembly goes by the judge, goes by the attorney, and commands the clerk to issue it. Congress says that the *venire* shall issue to the United States marshal; the Assembly says it shall issue to an officer whom it has elected, and whom it calls the territorial marshal. Congress says that twenty-three men shall be summoned for grand jurors; the Assembly says that eighteen shall be summoned. Which must give way—the Congress or the Assembly?

The challenge to the array must be overruled, and the demurrer thereto sustained. Let the grand jury be sworn.

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Supreme Court of the United States.

DECEMBER TERM, 1871.

HOSEA STOUT, Plaintiff in Error,
vs.
THE PEOPLE OF THE UNITED STATES
IN THE TERRITORY OF UTAH.

REPLY TO BRIEF FOR DEFENDANTS IN ERROR.

First. It is contended by defendants in error that, when the warrant of arrest is regular on its face, and purports to be based on indictment, the legality of the constitution of the grand jury, by whom the indictment was found, cannot be inquired into on *habeas corpus.*

I have not been able to find any case in which this precise point has been decided. In none of the cases cited in the brief of defendants in error is the question discussed or directly decided. It must therefore be determined by general principles and analogies. Although the decisions are very various and by no means reconcilable with each other, I think there is a general agreement to these propositions.

Where the arrest is by virtue of process issuing from a court over which the court or officer to whom the application is made has no supervisory jurisdiction in reference to the offense charged, the existence, validity, and present legal force of the process can be inquired into. Where the supervisory jurisdiction does exist, a wider discretion is permitted in examining into the circumstances attending the arrest. The existence of the process is determined by inspection. Its validity depends upon the existence of the legal precedents to its issuance. If the preliminary proceedings have been merely defective or irregular, the process is not thereby invalidated, but illegality in those proceedings makes the process void.

No one ever has, and probably, from the nature of the subject, no one ever can, state in general terms accurately the distinction between an irregularity and an illegality, as used in this connection. An irregularity is defined to be "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time or manner." "Illegality is properly predicable of radical defects only, and signifies that which is contrary to the principles of law, as distinguished from mere rules of procedure. It denotes *a complete defect* in the proceedings." (H~~a~~und on *Habeas Corpus*, p. 333.)

However little light this statement may shed upon the subject, it is probably as correct a general definition as can be given of the terms. Irregularity is a minor defect, and illegality is a radical defect; and all beyond this must be settled by a comparison of individual decided cases.

In the present case, the only foundation for the warrant is the indictment. A warrant of the court which did not recite the indictment would be void upon its face. The fact of its issuance does not presuppose the exercise of any judgment or discretion on the part of the court; but it rests for its validity upon the validity of the indictment. An indictment could only be found by a grand jury. And in order that a body of men should constitute a grand jury, they must have been procured and organized substantially in accordance with law. As the sole authority for the arrest is the finding of the grand jury, without which the court has no jurisdiction of the process, I claim that the legal existence of that body is a necessary preliminary to a valid warrant, and that illegality in its constitution is one of those radical defects which makes the process not only erroneous, but void. The fact that the Constitution of the United States says that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," shows how important an element this body is considered to be in a criminal procedure of this character, and justifies me in claiming the illegality in its formation to be among the radical defects, which may be inquired into collaterally by this writ, which the Constitution also makes the bulwark of personal liberty.

The following cases seem to me to sustain the right of this court to make this inquiry:

An indictment found by an illegally constituted grand jury is not merely irregular, but void.

6 McLean's Rep., vol. 6, p. 609–10. [illegible]
vide Doyle *vs.* State, 17 Ohio, p. 222. [illegible]
2 [illegible]

Upon habeas corpus, the legality of the constitution of the court, whose power is questioned, may be inquired into, and if found illegal, the process is void.

Brooks *vs.* Adams, 11 Pick., 441.

The regularity of the warrant and the jurisdiction of the court over the subject-matter are never conclusive; but on habeas corpus the legality of the steps taken by the court to acquire jurisdiction of the person and the process may be inquired into, and the invalidity of the warrant thereby established.

Ex parte Bollman, 4 Cranch, 75.
Nelson & Graydon *v.* Cutter, 3 McLean, p. 326.
Ex parte Beatty, 12 Wendell, p. 229.
United States *v.* Hamilton, 3 Dallas, 17.
State *v.* Stallnaker, 2 Brevard, 44.
Slocum *v.* Sims, 5 Cranch, p. 363.
Reynolds *v.* Ovis, 7 Cowen, p. 268.
Hurd on Habeas Corpus, pp. 350–51, and 364–65.

But where the court or judge, to whom the application is made, sustains such relation to the tribunal whose process is in question, that it has, in the ordinary course of justice, a revision of its decision in the particular case, a much larger discretion may be exercised on *habeas corpus*, and the prisoner may be discharged from process which is only voidable and not void.

Hurd on Habeas Corpus, 351-52, 354 & 359 and cases there cited.

In the case at bar, the judge, to whom the application was made, stands in this position. It was, therefore, his duty to have entertained the application, even if the affidavit had shown only irregularity, and not illegality, in the proceedings.

Second. Upon the main proposition, to wit, the legality of the mode pursued in forming this grand jury, I have to say, in reply to the argument of the Attorney General:

1st. It seems useless to discuss or refer to the common law mode of procuring jury panels, for the reason that the hypothesis of a vacuum in legislation, which alone would make it relevant, has no foundation in fact. It is not denied that the mode of procuring jury panels is a "rightful subject of legislation." The authority to legislate upon it was therefore expressly conferred by the organic act upon the territorial legislature, and that body has passed a law fully regulating the subject. If this legislation is invalid, it is because it is in conflict with legislation by Congress upon the same question. If Congress has not regulated it, then the territorial legislature, with, in that event unquestionable authority, has; and there is no room for the operation of a common law rule.

2d. It is conceded by the learned counsel, that the jury act of 1840 does not apply to the courts of the Territories. I think it clear that no other act of Congress, regulating the subject, is now in force. The first provision upon the subject was in section 29 of the act of 1789, entitled "An act to establish the judicial courts of the United States." This act established no territorial courts, but only the circuit and district courts, to which was given a portion of the judicial power granted by the IIId article of the Constitution. The act of 1800 was, by its title, an act to amend the judiciary act of 1789, and consisted of one section, which was a substitute for that portion of section 29 of the original act which provided for the formation of juries. The act of 1840 is entitled "An act to amend," &c., the amendatory act of 1800, for which it is, in its turn, evidently a complete substitute. The general frame of each of the provisions is the same, and the phraseology very similar. Where the words were changed, it was evidently done for the purpose of changing the law, and not for the purpose of making two laws upon the same subject. Thus, the act of 1800 says, "*jurors to serve in the courts of the United States shall be designated by lot or otherwise, in each State or district respectively, according to the mode,*" *&c.* The amendatory act of 1840 says. "*jurors to serve in the courts of the United States in each State respectively shall have the like qualifications * * * *, and shall be designated by ballot, lot, or otherwise, according to the mode,*" &c. Under well-known rules, the act of 1840 was a repeal of the former provisions upon the same subject; and if the words *in all cases*, in the act of 1789, and the word "district," in that of 1800, could be awarded any such force as is claimed for them in the brief of defendant, then the act of 1840, from which those words are carefully excluded, is a distinct declaration that thereafter the provision should have no such extent.

3d. The case of Orchard *v.* Hughes, cited by defendants, is simply a decision that, where the organic act gave to a court "chancery jurisdiction," this term embraced the well-known mode of procedure and practice in chancery, as distinguished from that at common law, and placed them, therefore, beyond the reach of territorial legislation. Nothing in the decision indicates any consideration of the question of the relation of the territorial courts to the federal Government, or any intention of disturbing the doctrine in that respect, so firmly settled in the cases of American Insurance Company *v.* Camten, and Bemen *v.* Poster.

4th. The 7th section of the act of 1856, cited by defendant, seems to me to have a different bearing from that suggested by counsel for the defendant. It strongly sustains the position that, in general legislation by Congress respecting the courts of the United States, the territorial courts are not included, but to be embraced require special mention. The language is:

> "The several circuit and district courts of the United States, the district courts of the territories, and the circuit court of the District of Columbia, shall have the power to discharge the grand juries of the respective courts whenever they shall be of opinion that the public interests will not be subserved by a further continuance of the sessions of said grand jury."

No one has ever questioned the *power* of Congress to legislate for anything and everything pertaining to the territorial courts, or any branch of the territorial government. But when we find that, in legislation designed to apply to them, Congress has thought it necessary to mention them specially, and that it designates them, not, as does the judge below, as "district courts of the United States," but as "the district courts of the territories," it certainly adds weight in favor of the conclusion otherwise reached, that they are not included in general legislation concerning the courts of the United States. The inference that, because Congress has chosen to legislate upon the discharge of grand juries, it may therefore be presumed to have legislated in relation to the formation of such juries, is unwarranted. The two subjects are entirely distinct. The discharge of a grand jury, even if ill-judged, could only affect the public order. The formation of the jury panel affects nearly the rights and liberties of the individual citizen. The latter the people have jealously guarded and they have kept its control close to themselves. The suggestion loses all its force, when it is remembered that the two subjects of discharge and formation are, by the respective acts concerning them, kept equally distinct in the United States courts proper. The circuit or district judge may discharge, but the State Legislature prescribes the mode of formation. In strict analogy, while the territorial judge may discharge, the territorial legislature regulates the mode of formation.

5th. I cannot agree with the concluding clause of the argument for defendant, that the *spirit* of the organic act of this Territory and of the legislation by Congress favors the practice inaugurated by the Utah court. So far from manifesting any desire of making the courts independent of the people in this respect, every act which Congress has framed has aimed to place its regulation within the control of the local legislative tribunals. There is not a court within its control, not even those strictly federal tribunals which exercise no judicial power except that conferred by the Constitution of the United States, that is not by the explicit command of Congress compelled to follow the regulations prescribed by the local legislatures.

The original act of 1779 requires that the courts should be guided by the enactments of the State legislatures. The act of 1800 is to the same effect. The principal object of the act of 1840 was to require the courts, instead of maintaining the system established by these legistatures, at the time of the passage of the original act, to conform to whatever changes in local legislation might be made upon this subject in the future. If the organic act of the Territory of Utah had not committed to the legislature elected by its people the control of the mode of forming panels of grand and trial jurors in its courts, it would have constituted a solitary and arbitrary exception to the spirit of congressional legislation upon this subject for the past eighty years.

C. J. Hillyer,
For Plaintiff in Error.

Hurd —

351-2

In the Supreme Court of the United States.

[illegible] Term, 1871.

[illegible], Plaintiff in Error,

vs.

The People of the United States in the Territory of Utah.

No. [illegible]

In error to the decision of the Chief Justice of the Supreme Court of the Territory of Utah, on habeas corpus.

BRIEF FOR THE DEFENDANT IN ERROR.

Hurd — 351-2

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

HOSEA STOUT, *Plaintiff in Error*,
vs.
THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.
No. 478.

In error to the decision of the Chief Justice of the Supreme Court of the Territory of Utah, on habeas corpus.

BRIEF FOR THE DEFENDANT IN ERROR

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

HOSEA STOUT, *Plaintiff in Error,* *vs.* THE PEOPLE OF THE UNITED STATES IN THE TERRITORY OF UTAH.	No. 478.

In error to the decision of the Chief Justice of the Supreme Court of the Territory of Utah, on habeas corpus.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT.

The plaintiff in error was indicted for murder in the the third judicial district court for the Territory of Utah, at the September term, 1871, of which court the Hon. James B. McKean, chief justice of the supreme court of Utah, is judge, assigned to that district in accordance with the organic law of the Territory. Having been arrested on this indictment, and being in the custody of the United States Marshal, on the 30th of October, the plaintiff in error applied to Chief Justice McKean for a writ of habeas corpus, upon the ground that he could "only be indicted for the crime aforesaid by a grand jury duly selected, drawn, summoned, and impanelled according to the laws of the Territory of

Utah; that said grand jury, by whom said pretented indictment was found, was not drawn according to said law, but an open *venire*, was issued by order of the Hon. James B. McKean, judge of the third judicial district court of Utah Territory," which was delivered to the United States marshal for the Territory, who selected and summoned the persons composing the grand jury which returned the indictment, and who "were selected, chosen, and designated, and called by said marshal of the United States for Utah Territory promiscuously, and not by any drawing or ballot, as prescribed by the laws of said Territory, and in contravention of each and every section of the laws of said Territory prescribing the manner of drawing, selecting, and obtaining jurors to serve in the district courts of said Territory. Said jurors "were not selected, summoned, or called in accordance with the provisions of any act of Congress, nor in accordance with the practice or rules of any court of the United States, nor in accordance with any rule of this court." On the 2d of November, Chief Justice McKean refused the writ, and in so doing, in accordance with the territorial law, made the following decision:

> "The territorial legislation touching grand jurors in federal courts being inapplicable thereto, and inconsistent with federal legislation and practice, and the grand jury mentioned in the foregoing application for a writ of habeas corpus having been selected, summoned, and impanelled in accordance with the last-named legislation and practice, the said application is denied."

The relator thereupon brought this writ of error.

ARGUMENT.

By section 9 of the act of September 9, 1850, establishing Utah Territory, (9 Statutes at Large, 455, 456,) an extraordinary provision is made for the allowance of writs of error to the Supreme Court of the United States "from the decisions of the said supreme court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of habeas corpus involving the question of personal freedom." It is further enacted, that "the said supreme court and district courts of the said Territory, and the respective judges thereof, shall and may grant writs of habeas corpus in all cases in which the same are granted by the judges of the United States in the District of Columbia."

The territorial legislature, by the act of February 2, 1852, in accordance with which this writ of habeas corpus seems to have been applied for, provides that the writ, when allowed, may be served in any part of the Territory, and that, "when the writ is disallowed, the court or judge shall cause the reasons of such disallowance to be appended to the petition and returned to the person applying for the writ." It would seem to be apparent, that if the district judge erred in denying the application for a discharge by habeas corpus under the territorial act, the decision may be reviewed, on writ of error, by this court.

I.

It is contended that the question of whether the grand jury which indicted the plaintiff in error was legally summoned or not, could not be inquired into on habeas corpus. There is nothing on the face of the indictment to show that the grand jury was not legally summoned. The regular mode of contesting the question whether the indictment was returned by a lawful grand jury would seem to be by plea in abatement. (1 Bishop on Crim. Proc., section 749.) A question of this kind cannot be raised collaterally on a habeas corpus for the discharge of the prisoner. Where a prisoner is detained under process, lawful upon its face, issued by a court of competent jurisdiction, any latent defect or error in the proceedings must be corrected by writ of error or certiorari, and not by habeas corpus. The proceedings in such case are not void, but voidable, and, of course, must stand until reversed or annulled in the proper course of proceedings in a court having authority to revise and annul it.

Wilmot's Opinions, 106, 107.
Hurd on Habeas Corpus, 331, 322, and cases cited.
Ex parte Lees, E. B. & E., 828.
Herrick *vs.* Smith, 1 Gray, 49, 50.

And at common law, where a person is in custody under an indictment found in a lower court, the record must be brought up by *certiorari* to the court issuing the writ of *habeas corpus* before it can inquire into the validity of the proceedings and the commitment thereunder.

Bac. Abr., Habeas Corpus, B, 3.

If, therefore, the application for a writ of habeas corpus in this case had been made to a superior court, having authority to revise the decisions and proceedings of the court in which the indictment was found, there would have been no grounds for granting the writ.

But this case is still stronger, and one in many respects of novel impression; for the application for the writ of habeas corpus is made to the judge of the court under whose warrant the prisoner is held. It is a case in which the writ is used for the purpose of raising before that very court the question of the validity of the indictment—that is, as a substitute for a demurrer or a plea in abatement to the indictment. Not only is such a use of the writ of habeas corpus unprecedented, but the question of the legality of the grand jury which found the indictment, and the consequent validity of the indictment, cannot be raised in this manner; and the judge, whether his reasons for denying the application were correct or not, acted rightly in refusing to discharge the prisoner.

This being so, this court cannot inquire into the legality of the grand jury. When a writ of error from decisions on habeas corpus was provided in the act creating the Territory of Utah, the intention was to allow this court to review the decisions of the courts of Utah upon writs of habeas corpus where it was sought in matters that could be inquired into by it, by the rules of common law and the ordinary practice of the courts, and not to make it the duty of this court to review while the proceedings themselves are pending the validity of any one or more steps in a criminal prosecution, merely because a writ of habeas corpus was used to test them; and if a person is rightly refused the writ, because it is asked for to raise questions which cannot properly be inquired into by means of such process, the jurisdiction of this court must fall.

II.

But assuming that this court can, in the present case, inquire into the legality of the constitution of the grand jury which indicted the plaintiff in error, it is contended that that decision of the judge was correct.

By section 9 of the act of September 9, 1850, (*ubi supra,*) it is enacted that the judicial power in Utah Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace; that "the said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as may be prescribed by law. * * * Each district court, or the judge thereof, shall appoint its clerk," and each district court "shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States."

By section 10 an attorney and marshal are provided for.

By section 17 "the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same or any provision thereof may be applicable."

It thus appears that the court in which this indictment was found was created by an act of Congress, and that all its officers, judge, clerk, marshal, and attorney are provided for by act of Congress, and it is very apparent that their powers can be in no respect limited or controlled by local legislation. The question is, how shall the grand jurors required by this federal court be summoned?

If there were no statute, either federal or territorial, touching the matter, it is apparent that the jurors must be summoned as at common law, which would require that they should be freemen and subjects, and be returned by the sheriff or other proper officer without nomination of any other person whatsoever. They are required to be *probi et legales homines*, and of the same county where the crime was committed. The better opinion would seem to be that they need not be freeholders.

2 Hawk., chap. 25, sections 16, 19, 21.
Bac. Abr., Juries, A.
Anon. Russ. & Ry., 117.

Contra.

2 Hale, P. C., 155.
4 Bl., Com., 302.

This court has recognized the authority of the common law in respect of the impanelling of juries in the courts of the United States.

United States *vs.* Marchant, 12 Wheat., 480.

United States *vs.* Shackleford, 18 How., 588.

By the 29th section of the judiciary act, (1 Statutes at Large, 88,) jurors to serve "in the courts of the United States shall be designated by lot or otherwise in each State respectively, according to the mode of forming juries therein now practised, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States. * * * Writs of *venire facias*, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal or by his deputy."

By the act of May 13, 1800, section 1, (2 Statutes at Large, 82,) "jurors to serve in the courts of the United States shall be designated by lot or otherwise, in each State or district respectively, according to the mode of forming juries to serve in the highest courts of law therein now practised, so far as the same shall render such designation practicable by the courts and marshals of the United States."

By the act of July 20, 1840, (5 Statutes at Large, 394,) section 1, jurors to serve in the courts of the United States in each State respectively, are to be designated by ballot, lot, or otherwise, according to the mode of forming such juries now practiced, "in so far as such mode may be practicable by the courts of the

United States, or the officers thereof; and for this purpose, the said courts shall have power to make all necessary rules and regulations for conforming the designation and impanelling of juries, in substance, to the laws and usages now in force in such State; and further, shall have power, by rule or order, from time to time, to conform the same to any change in these respects which may be hereafter adopted by the legislatures of the respective States for the State courts." It is admitted that this last statute applies only to States, and cannot include Territories.

But there is no reason for holding that the previous acts of 1789 and 1800, although undoubtedly designed primarily for the circuit and district courts in the States, should not apply to all United States courts which can come under the designation of district courts. The language is broad enough to admit of this construction. The act of 1789 is very broad in its language—"jurors in *all* cases to serve in the courts of the United States." The act of 1800 provides for the selection of jurors "in *each State or district* respectively," but the act of 1840 only refers to jurors "to serve in the courts of the United States in *each State* respectively." If the act of 1800 only applies to States, the words "or district" are tautological, but by construing these words to cover the courts in the District of Columbia and the several Territories, a complete system is established by these acts, supplemented by the rules of the common law, for the grand juries in all United States courts; that is to say, in all courts established by act of Congress, whether in the several States, the District of Columbia, or the Territories, with the power reserved to the States to change the mode of selection, a power not entrusted to the territorial legislatures.

Orchard *vs.* Hughes, 1 Wallace, 73.

United States *vs.* Reid, 12 How., 361.

If these statutes do not apply to Utah, *proprio vigore*, they do by force of the 17th section of the act establishing the Territory.

The rules of the common law furnish a usage, according to which, under the acts of 1789 and 1800, the jurors required in the United States courts in Utah Territory may be drawn, and, either by force of the above statutes or by force of the common law itself, grand jurors in Utah must be drawn according to common-law usage in the absence of other legislation. Such was the law which came into force simultaneously with the creation of the Territory of Utah, and of the courts established by its organic law, and such is the law now in force there, unless the territorial legislature has power to alter it by statute.

The power given to the territorial legislature by the organic law is undoubtedly very broad, but it must receive a reasonable construction, and it would be in stricter conformity with the spirit of the whole act, and with the principles upon which it was framed, and under which the district courts and all their officers are provided for by Congress, and placed beyond the control of the local legislature, to hold that the jurors required by these courts should be summoned in the manner prescribed by Congress, or indirectly approved by Congress, (by no change being made therein,) namely : the common law, than to hold that the mode can be changed at the pleasure of the legislature which did not create, and which cannot alter the judicial system in other respects. And this construction of the act is in conformity with the long prevailing policy of Congress, which, while recognizing the rules of practice and procedure in force in the several States at the time that the United States courts were created, does not permit any change therein to be made by the State legislatures, by adopting the changes made from time to time in the practice of the State courts, except (as in the act of 1840, touching grand juries) where Congress itself expressly authorizes this to be done.

The act of 1856, section 7, (11 Statutes at Large, 50,) giving power to the several courts of the United States to discharge the grand juries whenever they shall be of opinion that the public interests do not require the further continuance of their session, and which expressly includes the district courts of the Territories, would seem to indicate that Congress supposed that this subject was one which, in the Territories as well as in the States, could be altered only by Congress itself.

GEO. H. WILLIAMS,
Attorney General.

C. H. HILL,
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[illegible] 1889 [illegible]